No. 14802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Preliminary Statement.

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, by which the appellant's motion to compel administrative approval of his proposed method of distributing certain ultrasonic devices under seizure to chiropractors licensed by the law of the State of California was denied.

Statement of Jurisdiction.

The District Court had original jurisdiction to try this cause under the provisions of 21 U. S. C. 334(a) which provides in part as follows:

> "*Seizure*—(a) *Grounds and Jurisdiction.*
>
> Any article * * * that is adulterated or misbranded when introduced into, or while in interstate

commerce, or which may not, under the provisions of Sections 334 or 335 of this Title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court within the jurisdiction of which the article is found * * *."

This Court has jurisdiction of the appeal under (new) 28 U. S. C., Sec. 1291 (June 25, 1948, Chap. 646, 62 Stat. 929), which provides as follows:

"Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, * * * except where a direct review may be had in the Supreme Court."

And under (new) 28 U. S. C., Sec. 1294, Subd. (4), which provides in pertinent part as follows:

"Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district."*

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*Notices of Appeal were filed on April 7, 1955 and May 27, 1955. Two Notices of Appeal were filed due to the provisions of the Order made by the United States District Court on February 9, 1955 providing that Claimant could submit any other proposal for distribution within a period of ninety days from the entry of this Order. In order to comply with the rule that notices of appeal must be made within sixty days, a Notice of Appeal was filed from the Order of February 9, 1955, and the second notice after the period of ninety days had elapsed as set forth in said Order. Both notices are consolidated for this one appeal.

Proceedings in the District Court.

On September 5, 1952, the United States of America filed a libel of information in the United States District Court in and for the Southern District of California, Central Division, seeking condemnation of 75 devices, more or less, designated as "The Schlessing Ultrasoniseur." [Clk. Tr. pp. 3-7, incl.] The libel based on Section 21, U. S. C. 334(a) charged that the articles were misbranded in violation of 21 U. S. C. 352(a) and (f)(1).[1]

The basis for this charge in the libel of information was that certain written statements and claims accompanied the devices when shipped that were false and misleading and in particular, represented and suggested that the devices provided an adequate and effective treatment for the cure of many diseases some of which could not be substantiated. [Clk. Tr. pp. 4-5.] That the libel further charged that additional false and misleading statements were made in connection with the operating instructions which accompanied the devices when shipped, as well as they did not bear adequate directions for use. [Clk. Tr. p. 6.]

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[1] *21 U. S. C. 352 (a) False or misleading label.*

"If its labeling is false or misleading in any particular."

. . .

(f) Directions for use and warnings on label.

"Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

The libel of information further alleged that the articles were misbranded within the meaning of 21 U. S. C. 351(c)[2] in that the device's strength differed and its quality fell below that which they purported and were represented to possess. [Clk. Tr. p. 6.]

On October 22, 1952, Mr. A. Schlessing, President of A. Schlessing & Co., intervened as Claimant in this proceeding. [Clk. Tr. p. 8.] The devices had been sold by A. Schlessing & Co., located in St. Louis, Missouri, to various chiropractors practicing in Southern California.

That on October 22, 1952, a Consent Decree of Condemnation was entered by the terms of which the devices under seizure were allowed to be returned to the Claimant pursuant to 21 U. S. C. 334(d)[3] to accord the Claimant the privilege of attempting to bring the devices into compliance with the law under supervision of a duly authorized

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[2]*21 U. S. C. 351 (c) Misrepresentation of strength, etc., where drug is unrecognized in compendium.*

"If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess."

[3]*21 U. S. 334 (d) Disposition of goods after decree of condemnation.*

"Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which

representative of the Federal Security Administrator.[4] The Consent Decree further declared in substance that the Claimant would not distribute the devices until a written release was obtained from a representative of the Federal Security Administrator. [Clk. Tr. pp. 8-14, incl.]

On May 24, 1954, Claimant filed a motion to compel administrative approval of Claimant's proposed method of distributing devices under seizure. [Clk. Tr. p. 27,] Said motion was heard in the United States District Court in and for the Southern District of California, Central Division, on November 22, 1954, and subsequently on December 22, 1954.

On February 10, 1955, the said Court denied Claimant's motion which, if granted, would have permitted distribution of the devices to chiropractors in California, and extended to the Claimant a period of ninety days with which to submit to the Department of Health, Education and Welfare any other proposal for distribution. [Clk. Tr. pp. 49-50.]

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sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 344 or 355 of this title, be introduced into interstate commerce, shall be disposed of by destruction."

[4]The Consent Decree of Condemnation filed in this case on October 22, 1952, directed that the condemned devices be brought into compliance with law under the supervision of the Federal Security Administrator who was then the head of the Federal Security Agency. On April 11, 1953, pursuant to Reorganization Plan No. 1 of 1953 and 67 Stat. 18, the Federal Security Agency was abolished and the Department of Health, Education, and Welfare established to administer the functions formerly in the said Agency under the supervision and direction of the Secretary of that Department. (18 Fed. Reg. 2053.)

Subsequently, on May 17, 1955, the said Court entered its Final Decree and the Court, having been advised by the parties that Claimant had no other additional proposal for distribution and chose to stand on the proposal which was rejected by the Court, it was ordered that the Claimant return the devices to the United States Marshal for this dictrict and that such devices were to be offered for sale by the said United States Marshal under conditions to be approved by the Los Angeles District of the Food and Drug Administration, Department of Health, Education and Welfare. [Clk. Tr. pp. 51-53.]

On May 17, 1955, an order was made staying the final decree, reducing the bond, and permitting removal of the devices. [Clk. Tr. p. 54.]

That Appellant thereupon commenced this appeal.

Statement of Facts.

That on the 5th day of September, 1952, the United States of America filed a libel of information and seized 47 machines known as "The Schlessing Ultrasoniseur." This machine is an ultrasonic device used to give a deep massage to patients afflicted with osteoarthritis and bursitis. [Clk. Tr. p. 22; Affidavit of A. Schlessing, Clk. Tr. pp. 37-40, incl.] That negotiations conducted on behalf of the owners of these devices, all being chiropractors licensed by the law of the State of California, by Mr. Schlessing and the Federal Food and Drug Administration resulted in the entry of the Consent Decree on October 22, 1952. As a result of the Consent Decree Mr.

Schlessing was given possession of the machines for the purpose of conducting experiments to demonstrate the safety and therapeutic value of the machine and to present to the Food and Drug Administration, Washington, D. C., labeling to which they had no objection. The Claimant thereupon shipped the 47 devices seized to his place of business at St. Louis, Missouri, where six of them were reconditioned from a physical standpoint to the satisfaction of the Department of Health, Education, and Welfare,[5] conducted numerous experiments and tests under the supervision of a representative of the Department of Health, Education, and Welfare, satisfying that agency that the machines had therapeutic value and submitted various proposed labels. The Department has no objection to the labeling set forth as Exhibit A attached to the Stipulation of Facts. [Clk. Tr. pp. 20-27, incl.] Claimant thereupon requested the Department for authority to return the devices in question to their owners. [Clk. Tr. p. 18.] Whereupon the Department refused Claimant's request. This refusal to release the reconditioned devices was based on the Department's view that chiropractors do not come within the exemption to the exemptions of the labeling division contained in 21 U. S. C. 352(f)(1), where a device is such that it cannot be labeled with adequate directions for its use. That these exemptions contained in 21 Code of Federal Regulations, Section

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[5]The Food and Drug Administration was placed under the supervision of the Department of Health, Education, and Welfare April 11, 1953 *Cf.* footnote 1. [Clk. Tr. p. 27.]

1.106[6] provide that where adequate labeling cannot be affixed to a device and that where practitioners are licensed by law to use the devices that the device may be labeled by affixing to the device a statement that federal law restricts the sale of the device to the profession so licensed. The Department refused to allow Appellant permission to distribute the devices with such a label containing the word chiropractor. Whereupon Appellant filed the motion in the District Court, subject of this appeal. That in connection with this motion it became necessary to determine the scope of the practice of chiropractic within the meaning of the Chiropractic Act of the State of California. Evidence as to the scope of the practice of chiropractic on November 7, 1922, and shortly prior thereto (the date of the passage of the Act) was offered by way of affidavit and exhibit.

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[6] *21 Code of Federal Regulations, Section 1.106.*

"(d) *Exemption for prescription devices*

"A device which, because of any potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and hence for which 'adequate directions for use' cannot be prepared, shall be exempt from section 502(f)(1) of the act [21 U. S. C. 352(f)(1)] if all the following conditions are met:

* * * * * * * *

"(2) The label of the device (other than surgical instruments) bears:

"(i) The statement 'Caution: Federal law restricts this device to sale by or on the order of a .....,' the blank to be filled in with the word 'physician,' 'dentist,' 'veterinarian,' or with the descriptive designation of any other practitioner licensed by the law of the state in which he practices to use or order the use of the device; and

"(ii) The method of its application or use.

"(3) The labeling of the device (which may include brochures readily available to licensed practitioners) bears information as to the use of the device by practitioners licensed by law to use it or direct its use. . . ."

Statement of Case.

The primary question is whether a chiropractor, who is licensed under the California Chiropractic Act, is a practitioner licensed by law to use or direct the use of devices such as the six reconditioned ultrasonic therapeutic devices involved in this case, so as to satisfy the requirements of 21 C. F. R., Sec. 1.106(e), as amended, and exempt the devices from complying with 21 U. S. C. 352 (f)(1).

In the Stipulation of Facts [Clk. Tr. p. 19, line 5], it is agreed that Ultrasonic therapy cannot be employed safely and efficaciously by the layman in self-medication, but requires competent supervision in its administration; that adequate directions for unsupervised lay use cannot be written for ultrasonic devices, within the meaning of 21 U. S. C. 352(f)(1). It is further agreed that interstate distribution which would not violate the Federal Food, Drug, and Cosmetic Act must therefore comply with the regulations which exempt devices from bearing adequate directions for use in their labeling. (21 C. F. R., Sec. 1.106, as amended.) One provision of these regulations exempts a device which is shipped to "a practitioner licensed by law to * * * use or direct the use of the device." (21 C. F. R., Sec. 1.106(e).)

The United States District Court in ruling upon Appellant's motion before such court held that the practice of chiropractic was limited to the following definition:

> "Chiropractic is a system for the practice of adjusting the joints, especially of the spine, by hand, for the treatment of disease and ailments."

Under this ruling it appears that chiropractors would be denied the use of any and all devices of whatever nature

and be limited strictly to the use of the hands. The adoption of this limited definition of chiropractic would prevent the use by chiropractors of all manner of devices used as adjunct therapy to adjustment of the spine. Chiropractors in this state have used various devices in connection with the use of adjunct therapy since long prior to the passage of the Chiropractic Act of 1922. Among such devices are the general use of all types of diathermy, galvanic and sinusoidal currents, ultra violet light, infra red light and other forms of light and sound therapy together with a variety of massage, friction and vibratory instruments.

There is no attempt being made in this case to enlarge the scope of chiropractic under the provisions of the California Chiropractic Act. Such Act provides for proper safeguards in Section 7 thereof, to the effect that Chiropractors are not authorized to practice medicine, surgery, osteopathy, dentistry or optometry, nor use any drug or medicine now or hereafter included in *materia medica.* This appeal is brought to contest the extremely restrictive definition of chiropractic adopted by the District Court and to clarify the scope of chiropractic under California Law in order that ethical chiropractors in this state may be protected in their efforts to effectively practice their profession and not have the scope of such practice continuously subject to interpretation by the lower courts.

Specification of Errors.

The Appellant contends that the United States District Court erred in the following particulars:

1. In holding that the practice of chiropractic is limited to the definition:

   "Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments."

2. In holding that:

   "Ultrasonic therapy * * * is not a part of the practice of chiropractic."

3. In holding that the practice of chiropractic is a stationary science and the scope of practice is not expanded by scientific developments and increasing educational requirements and subjects taught in schools of chiropractic.

4. In holding that:

   "Ultrasonic therapy is not a necessary mechanical measure incident to the care of the body in the practice of chiropractic."

5. In holding that:

   "A chiropractor licensed under the laws of California is not authorized to use or direct the use of the ultrasonic devices under seizure in this case."

6. In holding that:

   "The term 'necessary mechanical * * * measures incident to the care of the body' as used in Section 7 of the California Chiropractic Act further delineates the scope of a licentiate's authority

to assure his right to use only such measures as are necessary and incidental to the care of the body in the practice of chiropractic, such as a chiropractic table."

7. In holding that:

"Ultrasonic therapy is a part of the practice of medicine; it is not a part of the practice of chiropractic nor is it a 'necessary mechanical * * * measure incident to the care of the body' as that term is used in Section 7 of the California Chiropractic Act."

8. In holding that:

"The ultrasonic devices under seizure in this case do not bear adequate directions for use and are not exempt from that requirement."

9. In holding that the Findings were supported by the evidence.

10. In holding that the conclusions of law were supported by the Findings.

Summary of Argument.

Appellant's argument is made under 12 major points. (See topical index.) In determining the primary question of this appeal, namely, whether a chiropractor licensed under the California law is authorized to use the devices in question, it is necessary to define and determine the scope of the chiropractic profession on, prior and subsequent to November 7, 1922. In short summary Appellant submits that prior to the passage of the Chiropractic Act of 1922 the practice of chiropractic consisted

of several theories and methods in use and practiced by those licensed under the Drugless Practitioners Act—there was no well known or defined definition of the scope of chiropractic. In 1922 when the Act was passed the practice consisted of the adjustment of the spine together with the use of adjunct therapy practiced by the Drugless Practitioner and the scope and extent of which, must be determined by reference to that which was taught as chiropractic in schools and colleges.

Physiotherapy as the term is now understood, is, and was, within the scope of chiropractic, it being one of the recognized adjunct therapies advocated and used by the practicing chiropractors in 1922. The devices in question are devices intended for use in physiotherapy treatment and have been developed along with other scientific advancements as an improvement in the method and practice in this field. Chiropractic is not a stationary method of healing; new methods and scientific advancements in this are as available to the chiropractor as to any other profession practicing the healing arts.

A reexamination of the scope of chiropractic and the cases construing the Chiropractic Act reveal that the chiropractor is not limited solely to adjustment of the spine by hand in the treatment of diseases and ailments.

I.

The Scope of the Practice of Chiropractic in the State of California.

The practice of chiropractic in the State of California is authorized under and by virtue of the Chiropractic Act which was an initiative Act passed November 7, 1922, and became effective on December 21, 1922. The provisions of this Act are contained in the appendix attached hereto.

A. Background of the Practice of Chiropractic in the State of California.

Prior to the time of the passage of the Chiropractic Initiative Act of 1922, all of the systems or modes of the healing of the sick in the State of California was regulated by the Medical Practice Act, now repealed (Deering's General Laws, 1931 ed., Act. 4807). Section 17 of this Act made it unlawful to practice any of them without a certificate which could be obtained, under that Act, only from the Board of Medical Examiners. Section 8 of the Act authorized such Board to issue four forms of certificates, designated as (1) Physician and Surgeon Certificate; (2) Drugless Practicioner's Certificate; (3) Certificate to practice Chiropody, and (4) Certificate to practice Midwifery. Chiropractors were licensed under the Drugless Practitioner's Certificate.

Historically, the chiropractic theory was first noted in about 1895 by D. D. Palmer. In 1903, B. J. Palmer, the son of D. D. Palmer, advocated this science as a

system for the prevention and curing of disease. B. J. Palmer, as the founder of the Palmer College, believed and taught that all disease of whatsoever kind and nature could be prevented or cured by spinal adjustment without resort to any kind of adjunct therapy. Practical experience soon taught those schooled in medical and scientific background that D. D. Palmer and B. J. Palmer adopted theories and practices that were erroneous when used in the cure and treatment of disease.

Study and research by various men in the field of chiropractic adjustment resulted in the modification of the theories and practices of D. D. Palmer and B. J. Palmer as well as new theories and practices. Long prior to 1922 other schools of chiropractic had developed which disagreed with Palmer's theories and which advocated spinal adjustment together with adjunct therapy as a method for the treatment of various diseases and ailments. As an example of this, the students of the Eclectic College of Chiropractic in Los Angeles, later the Los Angeles College of Chiropractic between the years 1920 and 1924 used and accepted the method of chiropractic advocated in one of their text books entitled "Spinal Adjustments," published in 1915 by Arthur L. Forster, Md.D., D.C. [App. Ex. P.]

It is stated on page 4:

> "Palmer, however, fell into one serious error. He did as so many before him have done. He became overzealous. He claimed that all disease is due to subluxations of the vertebrae and that all disease

could be eradicated by adjustment of the vertebrae. Naturally, such views could not be subscribed to by anyone with a liberal training in the sciences underlying the art of healing and especially, one with a knowledge of pathology. This preliminary training Palmer lacked; and it goes without saying that had he possessed such knowledge, he would not have made the claims which he did. He derided all other forms of therapy and persisted in his original views to the end. *Nevertheless, while the advancement made in chiropractic techniques has been very great, and broader views now obtain among the profession as a whole, still to Palmer must be given the credit for furnishing the impetus which carried chiropractic to a recognition of its wonderful possibilities.*" (Emphasis added.)

"It was, however, only natural that of all his disciples there should be some who could not agree with Palmer's views in their entirety. And such a condition of affairs really did arise. There were some who devised what they considered more accurate methods of spinal analysis to determine the existence of possible subluxations. Others originated different thrusts for the adjustment of the different kinds of subluxations. Still others, in addition to making changes in the manner of palpating and the forms of thrusts applied, incorporated adjunct methods of physiological therapy, such as attention to diet, hydrotherapy, massage, et cetera."

II.

The Theories of Chiropractic Within the Meaning of the Chiropractic Act Taught in the Schools and Colleges in 1922 and Prior Thereto.

There were many schools and colleges of chiropractic prior to 1922 many of which taught chiropractic theories and methods much different from the Palmer School previously referred to.

Prior to 1922, Alva A. Gregory, M.D., conducted a chiropractic school known as the Palmer-Gregory College in Oklahoma City, Oklahoma. His textbook entitled, "Disease and Rational Therapy," published by Palmer-Gregory College in 1913, stated as follows:

> "The following methods of drugless healing, we believe to be effective methods of treatment, and far superior to the ordinary methods of drug and surgical practice now in vogue.
>
> "We do not believe that these methods, either one or all of them, contain all the virtue there is in the different methods of the healing art, but we do believe that their adoption and use collectively, will reduce human suffering by combating the inroads of disease and by the prevention of premature death.
>
> "The methods which we recommend and use in drugless therapy, we enumerate under the following heads:
>
> 1. Fasting.
> 2. Dieting.
> 3. Suggestion.
> 4. Elimination.
> 5. Spondylotherapy.
> 6. Rectal dilation.
> 7. Physical Culture."

Joy M. Loban, D.C., Ph.C., was dean of the Pittsburgh College of Chiropractic. In his book entitled "Technic and Practice of Chiropractic," published by Loban Publishing Co., in 1918, he makes the following statements regarding the use of adjunct therapy in connection with chiropractic:

> "There are many methods of treating disease which are more or less beneficial to the patient just as there are some which are always injurious. Shall we employ such of these methods as are beneficial as adjuncts to the practice of Chiropractic? Or shall we adhere to the principle that the treatment of disease is erroneous and the adjustment of its cause the only logical method of procedure? There is much to be said on both sides of this question which has so long agitated the profession.
>
> "In the class of beneficial adjuncts may be placed massage, hydrotherapy, spondylotherapy, dietics, osteopathy, Christian Science, suggestive therapeutics, mechano-therapy and many others. Each of these has its field of usefulness; each taken alone is productive of some good in some cases at least. Each might possibly augment the results of Chiropractic, or hasten them in some cases, if judiciously used. By 'judiciously used' we mean the avoidance of any method which would in the least interfere with proper vertebral adjustment or its results or which might carelessly cause subluxation. Osteopathy and mechano-therapy frequently cause subluxation because of ignorance on the part of their users; they need not do so."

Another chiropractic college that operated prior to 1922 was the Carver Chiropractic College, in Oklahoma. The dean of this school was Willard Carver, L.L.B., D.C..

In his textbook entitled "Carver's Chiropractic Analysis," published by Roycrafters Co. in 1909, he states as follows:

> "As a sequel to its growth, the science of Chiropractic may now be said to consist of two principal parts: (1) *The science of function;* and (2) *the science of adjustment.*
>
> *"The science of function,* it will be readily seen, is of primary and vast importance, and in this sense vastly superior to the second. It inherently includes all knowledge of *anatomy, physiology,* and *function, normal* and *abnormal,* which again includes *symptomatology* and *diagnosis.*
>
> *"The science of adjustment,* while of secondary importance from the standpoint of a scholar or doctor, is clearly of primary importance in the scope of its office, which goes broadly into the details of *articulations, displacements, impingements,* and *restorations,* which, it may be easily seen, include much anatomy and all of the physiology of articulations. *Adjustment* must never be confused with *adjusting,* which is the *art of securing, by hand, the proper relation of the elements of a joint."*

Another school of chiropractic was operated by J. S. Riley, who was the dean of the Washington School of Chiropractic. In his book entitled, "Science and Practice of Chiropractic with Applied Sciences," published by the author in 1919, he reveals that this school of chiropractic advocated spinal concussion treatments as an adjunct to drugless therapy. This school advocated the use of a device known as a "concussor" which was operated by electric current. The spinal concussion was applied to nerve centers as distinguished from strictly spinal adjustment.

Various schools of chiropractic are referred to in the Encyclopedia Americana, published in 1922. On page 568 under the general category of Chiropractic it says:

> *"Education.*—There are several competent schools. The Palmer School of Chiropractic at Davenport, Iowa, is the oldest and one of the largest. The course of study in these institutions in point of hours equal 4,037, which is slightly in excess of the average four years medical school excluding the hours used in medical schools for materia medica, major surgery, etc. Studies taught are anatomy, physiology, symptomatology, pathology, minor surgery, obstretrics, microscopy, chemistry, bacteriology, gynecology, biology (in addition to which are those original to Chiropractic, viz., cycles, equations, metric system, serous circulation, intellectual adoption, adjustment, palpation, nerve tracing, analysis, chiropractic orthopody, anomology, restoration, spinography, etc.). Among the other modern good schools is the Universal Chiropractic College, also located at Davenport, Iowa; The Pittsburgh College of Chiropractic; The Carver Chiropractic College; Oregon Chiropractic School; Rudledge Chiropractic College. These institutions maintain a residual course of sufficient length in which 100 per cent of attendance is required."

Further evidence of the teachings of chiropractic which differed from the Palmer theory is shown from excerpts from text books used by some of the schools and colleges referred to in the Encyclopedia Americana. These excerpts reveal that adjunct therapy was advocated along with spinal adjustment for the treatment of disease and ailments prior to 1922. [See App. Ex. B, "Spinal Adjustment," by Arthur L. Forster, M.D., D.C.]

From the foregoing it is evident that there were many schools and colleges of chiropractic, other than the Palmer College, which had been teaching the science of chiropractic prior to the Chiropractic Initiative Act of 1922. Graduates from these schools were practicing chiropractic in the State of California prior to and during the year 1922 under the authority of the Drugless Practitioner's Certificate, and practiced the method of chiropractic taught and advocated by their particular school or college. Consequently, when the Initiative Act of 1922 was prepared it provided in Section 7[7] thereof that one form of certificate would be issued by the Board of Chiropractic Examiners which was designated "license to practice chiropractic." This language was used in Section 7 of the Chiropractic Act to show that there would be but one certificate for all schools of chiropractic as distinguished from separate certificates for each of the methods taught by various schools or colleges. This fact is further emphasized by Section 16 of the Chiropractic Act which provides in part as follows: "Nor shall this Act be construed so as to discriminate against any particular school of chiropractic, or any other treatment . . ." Throughout the Act where "schools of chiropractic" are mentioned, it refers to the various theories of chiropractic being taught by various schools at that time as distin-

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[7]"*Sec. 7.* One form of certificate shall be issued by the Board of Chiropractic Examiners, which said certificate shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chirapractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, denistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

guished from the actual physical location of schools and colleges of chiropractic. Any other construction would make meaningless the provisions in Section 16 to the effect that the Chiropractic Act should not be construed so as to discriminate against any particular school of chiropractic.

III.

The Chiropractic Act of 1922 Adopted a Broad Definition of Chiropractic Which Included the Use of Adjunct Therapy and Methods Previously Used by Practitioners Under the Drugless Practitioners Act.

In 1922 and for some time prior thereto the difference in chiropractic philosophy had developed into a heated controversy. The advocates of the Palmer theory and technique were sometimes referred to as "straights" while the advocates of the broader theory and technique of chiropractic were referred to as "mixers." The latter group included in their chiropractic practice other methods of treating nerve interference not only at the spinal vertebrae but at any place in the body that nerve continuity was occluded. This group further advocated and practiced adjunct therapy to accomplish this result. Many of the so-called "straights" refused to become licensed under the Drugless Practitioners Act which was in existence prior to the Chiropractic Act of 1922.[8] This ultimately

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[8]The minimum educational requirements as set forth in the Drugless Practitioners Act contained in Section 2231 of the Business and Professions Code, repealed by the addition of Section 2232 and Section 2497 of the Business and Professions Code, Stats. 1949, Ch. 23:

"§2231. *Evidence of professional instruction: Duration of courses:* Schedule of hours. Each applicant shall show by evidence satisfactory to the board that he has attended three resident courses

resulted in the case of *The People v. Ray S. La Barre* (1924), 193 Cal. 388, 224 Pac. 750.

In this case *quo warranto* proceedings were instituted to remove the five members of the first State Board of Chiropractic Examiners appointed by the Governor under the power conferred by the intitiative measure known as the Chiropractic Act of 1922. Section 1 of the Act provided that

> "Each member of the Board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder . . ."

It was an admitted fact in the case that none of the five members of the Board of Chiropractic Examiners

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of professional instruction in a school approved by the board, but these courses need not necessarily have been pursued continuously or consecutively. Each course shall not have been of less than thirty-two weeks in duration, and the total number of hours for all courses shall consist of three thousand hours according to the following schedule:

"Group 1. 600 hours.

Anatomy	485 hours
Histology	115 hours

Group 2. 500 hours.

Elementary chemistry and toxicology	200 hours
Physiology	300 hours

Group 3. 550 hours.

Elementary bacteriology	200 hours
Hygiene	100 hours
Pathology	250 hours

Group 4. 500 hours.

Diagnosis	500 hours

Group 5. 500 hours.

Manipulative and mechanical therapy	500 hours

Group 6. 350 hours.

Gynecology	150 hours
Obstetrics	200 hours
Total	3000 hours"

appointed under the Chiropractic Act was ever the holder of a license or certificate issued by the State Medical Board to practice either as a physician and surgeon or as a drugless practitioner. It was admitted that all treatments administered by the members of the Board were done without authority of law and in violation of the law. It was further stipulated that at the time said initiative act went into effect there were 91 persons lawfully qualified to practice within the State as chiropractors and who had been actually engaged in said practice for the term required by the Act under the authority of the drugless practitioners certificate.

The Supreme Court upheld the action of the trial court to the effect that the appointees were wanting in the legal qualifications necessary to entitle them to occupy the respective offices to which they had been appointed. The Court states on page 393:

> "The word 'practice' means, of course, engagement in the treatment or healing of the sick in accordance with the rules which the state in the exercise of the police power has prescribed. It is not necessary to read into the act, as appellants so vigorously insist, the word 'lawful' or 'legal' before the word 'practice' in order to justify the conclusion that the act contemplates the holding of a license under the Medical Practice Act as a prerequisite for eligibility on the part of an appointee to membership in said board. Lawfulness is a fixed element which inheres in every statute."

It is evident from the foregoing that from the inception of the California Chiropractic Act the practice of chiropractic was not limited to the Palmer theory to the effect that all disease could be cured by the adjustment of

the spine by hand but included the use of adjunct therapy. The Act contemplated that those chiropractors, practicing in this State, under the Drugless Practitioners Certificate, who advocated the use of adjunct therapy would continue to practice and use every procedure which serves to locate and correct nerve interference.

IV.

The Manner of Determining the Scope of the Practice of Chiropractic in California.

A. An Examination of the California Cases on the Scope of the Practice of Chiropractic Does Not Show That There Has Been a Determination of the Exact Scope of the Practice of Chiropractic Under the Chiropractic Act of 1922, as Amended.

It appears that the reason for the lack of a comprehensive definition of the practice of chiropractic in California has been that the courts have not been called upon to squarely determine this question. In most California cases the court has been called upon to determine primarily a criminal issue rather than to define the full scope of the practice of chiropractic. From the earliest cases the California courts have taken the position that evidence must be introduced to show the scope and practice of chiropractic at the time of the initiative Chiropractic Act of 1922 and in the absence of such evidence the courts have not been in a position to decide the primary issue presented in this case.

In the case at bar evidence has been presented by way of affidavits and exhibits to the court in support of appellant's motion that is sufficient to determine this question and thus in an examination of the following California cases the court was without the benefit of such evidence.

B. The California Cases on This Subject Have Been Examined and Indicate That It Is the Duty of the Trial Court to Examine Each Case With Reference to the Evidence as to Whether or Not the Particular Phase Involved Was Within the Meaning of the Term and Scope of the Practice of Chiropractic of the State of California.

In the case of *In re Hartman* (1935), 10 Cal. App. 2d 213. a licensed chiropractor was charged with a violation of the Chiropractic Act by unlawfully using the term physician and advertising himself as such; petitioner in that case had been convicted on other counts charging him with the possession of certain hypodermic instruments and with the use thereof. The court held that such activity on the part of the chiropractor could not be classed as a measure incident to the care of the body within the meaning of that portion of Section 7 of the Chiropractic Act which states: ". . . and also to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body . . ." Apparently no effort was made in such case to affirmatively establish by competent evidence what the scope of chiropractic consists of since the court states as the bottom of page 217:

> "It cannot be told, aside from the evidence, whether the method of treatment here in question is or is not a part of the practice of chiropractic. What constitutes chiropractic and what is included in such a practice is not defined in this act and could only be determined by the taking of evidence. As the court said in *Evans v. McGranaghan,* 4 Cal. App. 2d 202, 41 P. 2d 937: 'The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. *But the court has no way to determine the scope of chiropractic as taught in*

such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper.' Even if we could properly review the evidence in this proceeding there is no evidence in the record before us which would support a finding that the use of a hypodermic needle or the injection of an antitoxin is a part of chiropractic or included in whatever is covered by that word (emphasis added), and no evidence to the effect that such forms of treatment do not constitute the practice of medicine. On the other hand, the only evidence in the record is to the effect that two physicians, as expert witnesses, would testify that in their opinion these things constitute the practice of medicine and surgery and that a licensed chiropractor as an expert witness would testify that in his opinion the methods in question would not constitute a part of the practice of chiropractic."

In the case of *Evans v. McGranaghan* (1935), 4 Cal. App. 2d 202, 41 P. 2d 937, the respondent was a licensed chiropractor and entered into a contract in writing whereby respondent agreed to treat the appellant for a period of one year. The contract contained the following provision:

"The said services shall include chiropractic adjustment, and all mechanical, hygienic and sanitary measures incident to the care of the body deemed necessary by the party of the second part (respondent), and such mechanical, hygienic and sanitary measures shall include diet, concussion, traction, enemas, diathermy, sinusoidal, galvanic, Sunlite, cold quartz, massage, baths, hot and cold packs, manipulation, massage, X-ray, Laboratory tests, and such other like measures, provided that such measures or

modes of treatment are within the scope of the practice under the provisions of the Chiropractic Act of California. . . ."

The court held in that case that where a plaintiff is seeking a construction of a contract which depends upon the determination of the scope of practice allowed to the defendant under his license and the determination of such scope of practice depends upon evidence, it is incumbent upon plaintiff to produce it and in the absence of such evidence, the court would not take testimony for the purpose of reversing a judgment. The court states on page 204:

"As we construe section 7 of the Chiropractic Act it authorizes the license holder to practice chiropractic as taught in chiropractic schools or colleges, regardless of whether such practice would have been construed as the practice of medicine, surgery, osteopathy, denistry or optometry prior to the enactment of the Chiropractic Act. It contains no definition of 'chiropractic as taught in chiropractic schools or colleges' and hence in the absence of evidence on that subject it is impossible of precise construction. The act further, in our judgment, authorizes the license holder to use all necessary mechanical and hygienic and sanitary measures incident to the care of the body which are included in chiropractic as taught in chiropractic schools or colleges, if any there be (a subject upon which in the absence of evidence as to what is included in chiropractic as so taught we cannot reach any conclusion), together with any other such necessary mechanical, hygienic and sanitary measures the use of which would not constitute the practice of medicine, surgery, osteopathy, denistry or optometry, nor involve the use of any drug or medicine now or hereafter included in *materia medica.*"

The court further states on page 205 as follows:

> ". . . *that in order to determine the scope of the words 'chiropractic as taught in chiropractic schools or colleges' resort must be had to extrinsic evidence. The intent of the statute is clear upon its face: That the license shall authorize the holder to practice chiropractic as taught in chiropractic schools or colleges. But the court has no way of determining the scope of chiropractic as taught in such schools and colleges in the absence of evidence on that subject, and hence a resort to such evidence would be proper.* (Emphasis added.) (*People v. Borda,* 105 Cal. 636, 639, 640 [38 Pac. 1110]; 59 C. J., p. 1037.) This ruling comports with the holding of the appellate department of the Superior Court of Los Angeles County in *People v. Schuster,* 122 Cal. App. (Supp.) 790, 794, 795 [10 Pac. (2d) 204]."

V.

Evidence Presented in the District Court Reveals That the Subjects Taught in Schools and Colleges Prior to and at the Time of the Adoption of the Chiropractic Act of 1922 Did Not Restrict Chiropractic to Adjustment of the Spine by Hand.

The Affidavits of Dr. Lee H. Norcross, D. C., Dr. Harold A. Houde, D. C. and Dr. Carl Eric Hotchkiss, D. C. filed in support of Appellant's Motion for Administrative Approval along with the exhibits identified in and attached to the Affidavits shows the following:

Dr. Lee H. Norcross D. C., enrolled as a student in the Los Angeles College of Chiropractic in May, 1922 and graduated from said College on May 2, 1924; that he subsequently received the degree of Doctor of Naturopathy (N. D.) and the degree of Philosopher of Chiropractic (Ph. C.). Exhibit "A" attached to this affidavit

sets forth the subjects which he took at this college between May, 1922 and May 2, 1924. They are as follows:

Anatomy	580 hours
Histology	95 hours
Elem. Chem. and Toxicology	113 hours
Physiology	224 hours
Bacteriology	125½ hours
Hygiene and Sanitation	107½ hours
Pathology	194 hours
Diagnosis or Analysis	418 hours
Chiropractic Theory and Practice	516½ hours
Obstetrics and Gynecology	109 hours
Total	2,482½ hours

The affidavit of Dr. Harold A. Houde, D. C. shows that he was a student at the Los Angeles College of Chiropractic from October, 1920 through September, 1922. Photostatic copies of his record was marked Exhibit "A" and a photostatic copy of the course of instruction covering 4,000 hours offered to students of said college from October, 1920 through January, 1924 marked Exhibit "B" attached to the affidavit shows the following.

"Course of Instruction

The course of instruction covers 4,000 hours as follows:

Anatomy		800 Hrs.
I.	Osteology	800 Hrs.
II.	Myology	100 Hrs.
III.	Angiology	100 Hrs.
IV.	Brain	200 Hrs.
V.	Neurology	100 Hrs.

VI. Splanchnology	100 Hrs.
VII. Regional Anatomy	100 Hrs.
Histology	100 Hrs.
Embryology	100 Hrs.
Elementary Chemistry and Toxicology	100 Hrs.
Orthopedics	100 Hrs.
Physiology	200 Hrs.
I. Physiology of Digestion	50 Hrs.
II. Physiology of Circulation	50 Hrs.
III. Physiology of Respiration	50 Hrs.
IV. Physiology of the Nerves	50 Hrs.
Bacteriology	100 Hrs.
Hygiene and Sanitation	100 Hrs.
Physics	100 Hrs.
Pathology (General 100 Hrs., Special 100 Hrs.)	200 Hrs.
Biology	100 Hrs.
Diagnosis	850 Hrs.
I. Infectious and Systematic Diseases	100 Hrs.
II. Pediatrics	50 Hrs.
III. Dermatology and Syphilis	50 Hrs.
IV. Physical Diagnosis, Urine Analysis, X-ray	200 Hrs.
V. Nervous and Mental Diseases	200 Hrs.
VI. Genito-Urinary Diseases	100 Hrs.
VII. Eye, Ear, Nose and Throat Diseases	100 Hrs.
VIII. Geriatrics	50 Hrs.
Minor Surgery	100 Hrs.
Chiropractic Theory and Practice	300 Hrs.
Gynecology	100 Hrs.
Obstetrics	200 Hrs.
Actions of Drugs	50 Hrs.

Naturopathic Methods		400 Hrs.
I.	Massage	50 Hrs.
II.	Hydrotherapy	100 Hrs.
III.	Dietetics	50 Hrs.
IV.	Electrotherapy	100 Hrs.
V.	Spondylotherapy	25 Hrs.
VI.	Hyperemic (Cupping)	25 Hrs.
VII.	Psychology	25 Hrs.
VIII.	Medical Jurisprudence	25 Hrs.
		4,000 Hrs.

Also 800 Chiropractic adjustments are required.

The affidavit of Dr. Carl Eric Hotchkiss, D. C. shows that he enrolled in the Eclectic College of Chiropractic June 1, 1920 and graduated on June 1, 1921, a transcript of the hours and subjects taken attached to the affidavit marked Exhibit "A" shows the following:

Anatomy	800 hours
Physiology	300 hours
Histology	150 hours
Chemistry and Toxicology	200 hours
Hygiene and Sanitation	100 hours
Bacteriology	100 hours
Pathology	200 hours
Obstetrics and Gynecology	300 hours
Diagnosis or Analysis	500 hours
Chiropractic Theory and Practice	600 hours
Physical Therapy	200 hours
Minor Surgery	75 hours
X-ray	75 hours
Total	3,600 hours

The affidavits referred to show that in the Los Angeles College of Chiropractic one of the textbooks used by the College was the "Principles and Practice of Spinal Adjustment," by Arthur L. Forster, published at Chicago, the National School of Chiropractic, copyright 1915. [App. Ex. B.] These affidavits show further that at the time of the passage of the Chiropractic Act there were several theories or schools of Chiropractic, a majority of which taught and advocated the broad Forster definition of chiropractic as opposed to the special brand of chiropractic that was taught by the Palmer school.

The subjects heretofore set forth shows what was actually taught in the Los Angeles Chiropractic College prior to and during the year 1922. The affidavits show that a majority of the colleges in California taught similar courses or subjects. The knowledge of what was taught in such schools and colleges can therefore be applied to that provision of Section 7 of the Chiropractic Act which defines the scope of "chiropractic" as . . . "taught in chiropractic schools and colleges."

Exhibit "A" attached to the affidavit of Dr. Carl Eric Hotchkiss, D.C., shows that 200 hours of Physical Therapy was taught at the Los Angeles College of Chiropractic which was formerly called the Eclectic College of Chiropractic.

VI.

The Use of Adjunct Therapy in Addition to Spinal Adjustment Was Taught in Schools and Colleges Prior to and During the Year 1922 and Its Use Is Therefore Included Within the Meaning of the Term Chiropractic as Defined in the California Act.

Appellant's Exhibit "B" is a textbook used by the Los Angeles Chiropractic College and the National School of Chiropractic entitled "Principles and Practice of Spinal Adjustment," by Arthur L. Forster, copyright, 1915, by the National School of Chiropractic in Chicago, Illinois. The evidence that adjunct therapy was taught and advocated is clear. Commencing on page 386 it is stated as follows:

> "It may be asked, why, if the vertebral subluxations are the primary and predisposing cause of a certain disease, will adjustment of the subluxated vertebrae not of itself cure such a disease? Why, on the other hand, are accessory methods recommended?
>
> *"Adjunct measures are used in the treatment of some diseases for the following reasons.* (Emphasis added.)
>
> "1. They increase or add to the effectiveness of the spinal adjustment. For example, in chronic constipation, while the restoration of the nerve-supply of the bowel is accomplished by adjustment of the subluxated vertebrae, massage is recommended to assist the bowels in evacuating their contents until their muscular coat has regained its normal tone; correction of the diet is necessary to make the work of the intestines as light as possible during the period when extra demands are being put upon them. Ex-

ercises are valuable in building up the muscular structures of the body and consequently also of the abdominal walls and intestines. During these treatments spinal adjustment is continued, and is the prime factor in the restoration of normal function. The fact that other methods are used in connection therewith does not detract from the merits of the spinal adjustment, since these adjunct measures are merely assistive agents, in any case, in the same manner that drugs are, be it constipation or any other disease.

"2. *Adjunct measures are used for the elimination of contributing causes.* (Emphasis added.) For example, if the patient is suffering from Bright's disease, the contributing causes must be recognized and attention given them. It is evidently not sufficient in a case of this kind to adjust the tenth to twelfth dorsal vertebrae. This has been done many times, and no results obtained; and yet we know that the nerves emanating from these spinal segments influence the kidneys more than any others. For this reason a careful spinal analysis should be made in all cases to determine the existence of subluxations elsewhere. It would be manifestly folly to permit a patient with Bright's disease to eat irritating foods, one suffering from heart disease to exercise violently, or one having cirrhosis of the liver to use alcohol. On the other hand, a proper diet should be prescribed, moderate exercises advised, and liquors interdicted in each case respectively.

"3. Nearly all diseases are accompanied by a greater or less toxemia of some kind or nature. It is true that restoration of the functional activity of the secretory and excretory organs through spinal adjustments will ultimately rid the organism of these toxins. *Nevertheless, accessory methods greatly*

assist a more rapid elimination of the toxins and make the spinal adjustment so much more effective. (Emphasis added.) In many acute diseases it is the toxemia which produces dangerous symptoms, and speedly elimination is absolutely necessary. For this reason, adjustment at the tenth dorsal segment which stimulates the kidneys, and at the upper lumbar segments which influence the bowels, is advised in such conditions. In connection therewith hot baths, not enemata, etc., are given to still further increase the eliminative function of the skin and bowels.

"4. Dangerous symptoms may arise at any time in the course of some diseases, and even result in the patient's death before the cause can possibly be corrected, and the dangers obviated, by spinal adjustment. The temperature in an acute disease, as typhoid fever, may rise to a degree that may menace the life of the patient. This fever is due to an unusually virulent toxemia and immediate steps must be taken, to employ not only spinal adjustments, but eliminative measures, and combine these with methods directed against the fever itself, namely cold baths, sponges, compresses, etc. *Various symptoms must be given appropriate treatment, the above being an example illustrating the necessity for using adjunct measures.* (Emphasis added.)

"5. Other measures of treatment have shown their effectiveness in different diseases, and should therefore be used. *Spinal adjustment is not to be regarded as all in all in the treatment of disease and other measures which are of proven value should be considered. Such measures as massage, hydrotherapy, spinal concussion, elimination, diet, exercises, etc., may be successfully combined with spinal adjustment.* (Emphasis added.) Reasons for the desirability of using some of these adjunct measures have been given

above. These illustrations should serve to show that their use is a rational and logical procedure, yet does not detract in the slightest from the merits of spinal adjustment.

"6. Lastly, there are certain diseases and conditions that are impossible of cure by any known method of treatment and it would therefore be folly to employ spinal adjustment in them. Such diseases as advanced tuberculosis, cancer, etc., are accompanied by such profound destruction of tissue elements that recovery is impossible. Not only the organs primarily affected, but the entire 'house in which we live' is falling to pieces, and nothing can replace that which has been destroyed.

"There are other conditions which belong so manifestly in the realm of surgery that attempts to relieve them by spinal adjustment alone are irrational and ill-conceived, and show an ignorance of pathology. Most tumors, for instance, are amenable to no treatment other than excision."

The above quotations from one of the text books used prior to and during the year 1922 is uncontroverted evidence that the use of adjunct therapy such as massage, hydrotherapy, etc., was taught to the students of the Los Angeles College of Chiropractic and The National School of Chiropractic in Chicago, and advocated by such colleges as part of the chiropractic treatment. It shows further that this treatment and technique basically followed the principle that chiropractic is the maintenance of structural and functional integrity of the nervous system as being the cause of disease and that the practice of chiropractic consists of the use of any and all techniques and means to remove nerve interference at any place in the body including the vertebrae. This evidence is contrary to

the restrictive definition of chiropractic adopted by the United States District Court in its holding that

> "Chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments."

VII.

Physiotherapy Is Included in the Scope of Chiropractic Practice and the Ultrasonic Instrument in This Case Is a Therapeutic Device for Use in Physiotherapy Treatment.

Physiotherapy has been defined in the following ways:

The American Illustrated Medical Dictionary, 20th Edition, by Dorland:

> "Therapy—physical. The treatment of disease by physical (nonmedical) means, such as heat, massage, hydrotherapy, exercise, rest, occupation therapy, radiation, and electricity."

Taber's Cyclopedia Medical Dictionary:

> "Physical—therapy. The therapeutic use of physical agents other than drugs.
>
> "It comprises the use of physical, chemical and other properties of heat, light, water, electricity, massage, exercise, and radiation."

Webster's New International Dictionary, Second Edition, Unabridged, with Reference History:

> "Physical therapy. Med. The treatment of disease by physical and mechanical means, as by massage, regulated exercise, water, light, heat, electricity, etc . . ."

The 1953 California Legislature defined physio therapy in the Physical Therapy Act (Bus. and Prof. Code,

Secs. 2601 and 2660) effective September 10, 1953, as follows:

> "2601. 'Physical therapy' means the treatment of any bodily or mental condition of any person by the use of the physical, chemical, and other properties of heat, light, water or electricity, and by massage and active or passive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, and the use of electricity for surgical purposes, including cauterization are not authorized under the term 'physical therapy' as used herein.
>
> "2660. The term 'physical therapy' shall mean the treatment of any bodily or mental condition of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage, and active passive, and resistive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term 'physical therapy' as used herein, and a license issued hereunder shall not authorize the diagnosis of disease."

These definitions find their origin through common usage among all the professions, including the medical, osteopathic, chiropractic and others. The recent statute of the California Legislature regulating physiotherapy, hereinbefore referred to, indicates that the State Legislature considers that physiotherapy methods are available to chiropractors. The statute itself contains an exception with regard to persons authorized to use physiotherapy measures under an initiative act. Section 2665, Deering's California Business and Professions Code, states as follows.

"One year from the effective date of this act, no person not licensed under this chapter shall practice physical therapy in this State for compensation received or expected; provided, however, that this prohibition shall not apply to any of the following:

"(a) Any activities authorized by their licenses on the part of any persons licensed under this code or *any initiative act.* * * *."

The only initiative measures relating to the practice of the healing arts in this state are the measures dealing with osteopathy and chiropractic. The measure dealing with osteopathy gives the osteopathic physicians the same rights and duties as medical doctors and refers directly to the provisions of the Business and Professions Code which embody the old Medical Practice Act. The Chiropractic Act alone sets up an independent type of practice and undoubtedly is the Act to which the legislature made reference in the Physical Therapy Act.

In the 1955 Report to the California Legislature, made by the Senate Interim Committee on Licensing Business and Professions, published by the Senate of the State of California, March 15, 1955, representatives of the naturopathic profession appeared before the Committee appealing for licensure within the healing arts classification. Their request was denied by the Committee. The Committee, after comparing the educational prerequisites of naturopathy and chiropractic, stated in their report at page 96:

"It would appear, therefore, that a person obtaining the general basic knowledge required to become a naturopath is simultaneously obtaining the general basic knowledge required to become a chiroprac-

tor and could, therefore, seek to comply with the requirements for entrance to the latter profession.

"Again, the scope of practice of the two groups seems quite similar. Unfortunately, there is no adequate definition of chiropractic now contained in the law but as observed above the courts in the case of Oosterveen v. Board of Medical Examiners (112 C. A. 201, 246 P. 2d 136) held that a chiropractor may perform almost every function contained within the general definition of naturopathy. For these reasons, the committee, therefore, feels that the State may be providing a method by which this general school of thought of the healing arts may be practiced under the authority of a license for doctor of chiropractic."

This expression of the Senate Interim Committee further bears out the attitude of the Legislature regarding the authority of the chiropractic profession under the Act of 1922 to use adjunct therapeutical measures of which physiotherapy is one.

A case in which evidence was presented as to the scope of chiropractic and the use of physiotherapy, was the unreported case of *Percy Purviance v. Charles Brockman* which was tried in the Superior Court of the State of California in and for the County of Amador. This case was tried in 1939 and bears the Superior Court No. 4284. The case involved an action in declaratory relief instituted by the plaintiff under Section 1060 of the Code of Civil Procedure to obtain a declaration of his rights and duties concerning a contract previously entered into by the parties. Both the plaintiff and defendant were licensed chiropractors and the contract provided that plaintiff was to "work in the offices of the defendant under the direc-

tions of the defendant, beginning November 15, 1938, and to treat patients of the defendant and practice chiropractic as taught in chiropractic schools and colleges, and also to use all necessary mechanical, hygenic and sanitary measures incident to the care of the body, and shall include hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, on patients of the defendant. Defendant subsequently refused to permit plaintiff to do the things enumerated in the contract upon the ground that it might be held that such services and practice did not come within the rights or powers of one holding a license as a chiropractor, and that by becoming a party to such acts, defendant might expose himself to prosecution. The court held the contract valid in this case stating that the evidence showed that hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, were taught as chiropractic in chiropractic schools and colleges. The court also held that:

> "The Chiropractic Act also provides that in addition to the practice of chiropractic as taught in chiropractic schools and colleges that the license authorizes the holder 'and, to use all necessary mechanical and hygenic and sanitary measures incident to the care of the body' but shall not authorize the practice of medicine.
>
> "To show that these things mentioned in the contract, namely: hydrotherapy, electrotherapy, light, heat, hot and cold packs, diet, massage, enemas, together with anatomical and manual manipulations, are not the practice of medicine under the Medical Practice Act which is now found in the Business and Professions Code of California in Section 2138, 'The

drugless practitioners certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations and without in any manner severing or penetrating any of the tissues of human being except the severing of the umbilical cord.' 'It also authorizes the general and local application or use of any and all manipulative, electro-therapeutical, hydro-therapeutical, dietary and psychological methods of treating the sick or afflicted, including physiotherapy, physical therapy, colonic therapy.'

"It is manifestly evident if these things mentioned in the Drugless Practitioner's Certificate are not the practice of medicine under the Medical Act, then they are not the practice of medicine under the Chiropractic Act." (Emphasis added.)

"In the case of *People v. La Barre,* 193 Cal. 388, the Supreme Court said relative to the Chiropractic Act: 'The initiative was intended to accomplish the same object that all general health laws are designed to accomplish and is *in pari materia* with all other acts regulating the same general subject.'

"The Medical Law does not provide for the teaching of physical therapy, and the curricula of the State University Medical College has no course provided in it; and the same can be said of Stanford University Medical School and as chiropractic colleges do teach physiotherapy then it belongs to the chiropractors as a prior arts right.

"And Section 18 of the Chiropractic Act provides: 'Nothing herein shall be construed as repealing the Medical Practice Act of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendment may conflict with the provisions of this act as applied to persons licensed under

> this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.' The use of the things mentioned in the contract are not the practice of medicine and are permitted to the use of the chiropractor under the scope of a chiropractic license."

The above decision cannot be reconciled with the holdings in the cases of *People v. Fowler* (*infra*), and *People v. Mangiagli* (*infra*). The case however, was not a criminal matter and the court had an opportunity to consider the scope of chiropractic as the primary issue involved.

In the case of *Oosterveen v. Board of Medical Examiners* (1952), 112 Cal. App. 2d 201, 246 P. 2d 136, referred to in the Committee Report previously referred to, the appellants were graduate naturopaths and chiropractors, not licensed to practice in the State of California. The practice of naturopathy in the state of California without being licensed in one of the healing arts is a violation of the Business and Professions Code, Section 2141.

There is no provision in California State law for the issuance of a license to practice naturopathy since the repeal of the Drugless Practitioners Act in 1949. The trial court defined naturopathy as follows:

> "That Naturopathy is a mode of healing that attempts to restore and maintain health by the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, and does not advocate the use of drugs and medicines but does advocate the use of 'dietary supplements' which said dietary supplements include all substances found in nature, including those substances found in herbs, the earth and animal tissues,

whether raw or refined, and it does not include the use of surgery or the penetration of the tissues; . . ."

The defendant Board of Medical Examiners agreed with the conclusion of the trial court: *"That the methods of naturopaths may be employed by licensed chiropractors . . ."* The court quoted on page 106 as follows:

"It is of common knowledge that nature is the indispensable healing agency and that practitioners of medicine and surgery, osteopathy and chiropractic make use of the curative qualities of light, air, water, rest, diet and physical and mental culture in connection with the agencies peculiar to their several systems of healing."

The court further stated:

"Plaintiffs, being unlicensed, may not, under the present law, practice at all. Even if they should become licensed as physicians and surgeons or chiropractors, they could not practice naturopathy in its true sense, inasmuch as they could not use the title 'Naturopath' or 'N.D.' nor hold themselves out as such. But they must become licensed either as physicians and surgeons (which now includes osteopaths) or as chiropractors in order to employ their methods."

The decision of the court in this case was the primary reason that the legislative committee investigating the advisability of having separate licenses for Naturapaths reported that this was unnecessary because chiropractors and others could perform almost every function contained within the definition of Naturopathy. The court in deciding that chiropractors could perform the functions of a Naturopath necessarily rejected the proposition that the scope of chiropractic is limited to spinal adjustment as advocated by the Palmer school of chiropractic.

VIII.

The Ultrasonic Instrument Is a Therapeutic Instrument for Use in Physiotherapy Treatment.

The ultrasonic device was designed mainly for use by practicing physiotherapists, chiropractors, osteopaths, and physicians in conjunction with other forms of treatment. The device is calibrated to put out one half of a watt per square centimeter of the transducer head which is not harmful in the hands of persons authorized by law to use it. The physician normally uses an output of energy from 3 to 6 watts per square centimeter of the transducer head. The instrument is used in the treatment of two diseases, bursitis and osteoarthritis. It was conceived and manufactured as a physiotherapy device which, in effect, accomplishes a deep massage and is therefore valuable for use as a physiotherapy instrument together with the treatment of the two diseases mentioned above. The massage is accomplished by the application of high frequency sound waves producing rapidly alternating compressions and rarifications within the tissues. When such therapy is applied to the surface of the body therapeutically, the sound waves penetrate and relieve congestion in tissues beneath the surface. As an adjunct therapy instrument it is used to speed up removal of nerve interference, and ameliorate severe reactions reducing muscle spasm and relieving pain. It has had considerable use by athletic organizations for the treatment of ailments such as set forth above.

IX.

The Law Governing Chiropractic Is a Creature of State Statute and Its Scope Should Be Determined Strictly in Accordance With the Law of the Particular State Involved.

The California decisions dealing with the scope of chiropractic indicate that the courts did not have presented the evidence that is available in this case. Possibly the reason is that most of the cases were criminal in nature and hence the prime issue has never been the true scope of chiropractic but rather the guilt or innocence of the defendant. In most instances the defendant was a chiropractor who advocated the scope of his chiropractic license as a defense without introducing sufficient evidence to show the court what the scope of chiropractic was meant to be under the Initiative Act of 1922. The courts have commented upon deciding the scope of chiropractic in the absence of such evidence. See *Evans v. McGranaghan* (1935), 4 Cal. App. 2d 202, 41 P. 2d 937, and *In re Hartman* (1935), 10 Cal. App. 2d 213, 51 P. 2d 1104.

One such case was the case of *People v. Fowler,* 32 Cal. App. 2d Supp. 737, 84 P. 2d 326, 330-331 (App. Dept., Superior Ct., L. A. County, 1938). This was a criminal case in which the defendant was charged with violating Section 2141 of the Business and Professions Code. Defendant was charged with practicing "a system and mode of treating the sick and afflicted", and "diagnosed, treated, operated for and prescribed for an ailment, blemish, deformity, disease, disfigurement, disorder, injury and other mental and physical condition" of a named person, without having a valid unrevoked certificate authorizing him to do so, issued by the board of medical

examiners or the board of osteopathic examiners. The defendant was a duly licensed chiropractor and he contended that what he did was authorized by his chiropractic license. The defendant alleged that by reason of the provisions of the Chiropractic Act (enacted in 1922 as an initiative measure; Stats. 1923, Deering's Gen. Laws, 1937 Ed., Act 4811) the complaint must, in order to charge a public offense, negative the possession by the defendant of a license issued under that act by the board of chiropractic examiners, or else allege that the acts done were not such as could lawfully be done under such a license. The court held the complaint to be sufficient thereby upholding the action of the trial court (Municipal). Commencing on page 745 the court ran the gauntlet of definitions of chiropractic citing certain dictionaries and decisions from other jurisdictions. All of the definitions used in the decision restricted chiropractors to adjustment of the spine by hand. For example, the court cites the Standard Dictionary, 1913 edition, defining chiropractic as "A drugless method of treating disease *chiefly* by manipulation of the spinal column." On page 746 the court refers to other definitions, two of which are as follows:

> "A system of therapeutic treatment for various diseases, through the adjusting of articulations of the human body, particularly those of the spine, with the object of relieving pressure or tension upon nerve filaments. The operations are performed with the hands, no drugs being administered (taken from Nelson's Encyclopedia), and a system of manipulations which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation (from International Encyclopedia)."

Some of these definitions of chiropractors are not contrary to the position taken by the Appellant in this appeal. For example appellant does not dispute the definition of chiropractic which states that it is a drugless method treating disease *chiefly* by manipulation of the spinal column. The conclusion that chiropractic is limited strictly to manipulation of the spinal column by hand is however disputed. An examination of the laws of other states reveals such a wide variance in defining the scope of chiropractic that it becomes necessary to examine the scope strictly in accordance with the definition of the particular state involved.

Examples of this wide variance can be seen by referring to definitions of chiropractic used by some of the other states.

The Arizona law provides

> "licensee may adjust by hand any articulations of the spinal column but may not prescribe for or administer any medicine or drugs, practice major or minor surgery obstetrics, or any other branch of medicine, or practice osteopathy."
>
> Secs. 67-704 A. C. A., 1939.

In New Mexico the scope of chiropractic is defined as follows:

> ". . . Said license, when granted by said Board of Chiropractic Examiners, shall entitle the holder thereof to diagnose and treat diseases, injuries, deformities or other physical or mental conditions, by the use of any or all methods as herein provided, such as palpating, diagnosing, adjusting and treating diseases, injuries and defects of human beings by the application of manipulative manual and mechanical means, including all natural agencies imbued with the healing act, such as food, water, heat, cold, electricity,

vacuum cupping and drugless appliances, without the use of drugs or what are commonly known as medicinal preparations, or in any manner severing or penetrating any of the tissues of the human body, known as surgery; . . ."

New Mexico Statutes, 1953 Ann., Chap. 67, Art. 3, Sec. 67, pp. 3-4.

The Idaho law defines the practice of chiropractic as follows:

"54-712. Practice of chiropractic defined.—Any licentiate under this chapter may adjust any displaced segment of the vertebral column or any displaced tissue of any kind or nature, for the purpose of removing occlusion of nerve stimulus in the bodies of human beings, and practice physiotherapy, electrotherapy, hydrotherapy, as taught in chiropractic schools and colleges, but nothing herein contained shall allow any licentiate to prescribe medicine, perform surgical operations or practice obstetrics."

Idaho Code, Secs. 54-712.

The State of Nevada defines chiropractic as follows:

"Chiropractic is defined to be the science, art and practice of palpating and adjusting the articulations of the human body by hand, the use of physiotherapy, hygenic, nutritive and sanitary measures and all methods of diagnosis; provided, however, that in such diagnosis no piercing or severing of body tissues shall be permitted, save and except for the drawing of blood for diagnostic purposes only. Nothing in this act shall be construed to permit a chiropractor to practice medicine, surgery, obstetrics, osteopathy, dentistry, optometry or chiropody."

Nevada Compiled Laws, Sec. 1084.

In the State of Ohio certificates are issued for each of the limited branches listed in the Ohio law. This is set forth as

> *"Sec. 4731.15 (1274.1). Examination and registration of practitioners of limited branches of medicine or surgery.*
>
> "The state medical board shall also examine and register persons desiring to practice any limited branch of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include chiropractic, naprapathy, spondylotherapy, mechanotherapy, neuropathy, electrotherapy, hydrotherapy, suggestive therapy, phychotherapy, magnetic healing, chiropody, Swedish movements, massage, and some other branches of medicine or surgery as the same are defined in section 4731.34 of the Revised Code, except midwifery and osteopathy."
>
> *Ohio Revised Code,* Tit. 47, Chap. 4731, Sec. 4731.15.

An examination of these various state statutes demonstrates the futility of relying upon a general definition of chiropractic to decide its scope in any one state. Such scope is strictly a creature of statute and the drastic differences in state laws reveal that what is chiropractic in one state may not be chiropractic in another.

These differences were overlooked in the Fowler decision and the court after reciting the definitions from various states together with general definitions found in dictionaries and encyclopedias concluded as stated on page 746 of the decision that "this general consensus of definitions, current at and before the time of the Chiropractic

Act was adopted, shows what was meant by the term 'Chiropractic' when used in that Act."

The unfortunate part of this holding is that other California courts adopted the same conclusion in similar cases. (See *People v. Mangiagli,* 97 Cal. App. 2d Supp. 935; *United States of America v. 22 Devices, etc.,* 98 Fed. Supp. 914.) This decision by definition is further unfortunate because more care could have been used in the definitions adopted. For example—on page 746 of the *Fowler* decision a definition of chiropractic is referred to from Nelson's Encyclopedia as follows: "The operations are performed with the hands, no drugs being administered." Compare this with a more complete definition from Thomas Nelson & Sons Encyclopedia, copyrighted in 1905, revised in 1935:

> "CHIROPRACTIC is the science of restoring health by locating and correcting interference with transmission and expression without the use of drugs or surgery. The practice of chiropractic is based upon the premise that normal function results from normal delivery of nerve impulses to all organs and tissues and that disease results from the interference with such delivery. The chiropractic premise holds that all vital organs are supplied with two sets of nerves. One of these conveys activated nervous impulses while the other conveys inhibiting nerve impulses to each organ. Any imbalance which results from interference with transmission in either of these sets of nerves leads to functional imbalance, thus resulting in either increased or decreased function. The chiropractor contends that this functional imbalance may, if continued, lead to pathology in the organ or organs involved.
>
> "The chiropractor diagnoses his cases, employing the usual and accepted diagnostic procedure. This

he does for the purpose of learning which organs or parts of the body are affected. With his knowledge of the nervous system he knows the paths followed by the nerves supplying the organs involved and through his manipulative methods he proceeds to correct such interference.

"The chiropractor works chiefly on the spine and its immediately adjacent tissues for the purpose of relieving any pressure or tension on nervous fibers which exist between the vertebrae. *However, he holds that every procedure which serves to locate and correct nerve interference is proper chiropractic procedure.* (Emphasis added.) He contends that when this is done, normal function is restored and when this takes place the disease which has resulted will automatically be eliminated through the natural healing powers within the body. The chiropractor holds that this theory concerning the importance of inhibiting and activating nerve fibers in the maintenance of normal function is in harmony with the facts of physiology which have been definitely proved by scientists in no way connected with the chiropractic profession.

"This system of healing was instituted in 1895 by Daniel D. Palmer, who first began to teach his doctrines and knowledge of body mechanics in Davenport, Iowa.

"Consult:

B. J. Palmer, 'The Science of Chiropractic' (1917).

J. M. Loban 'Technic and Practice of Chiropractic' (1920).

J. S. Riley, 'Science and Practice of Chiropractic' (1920)."

The *Fowler* case was relied upon in the later case of *United States of America v. 22 Devices,* more or less, labeled in part "Halox Therapeutic Generator", 98 Fed. Supp. 914. The court in that case states as follows:

> "The scope of this authority has not been defined by the Supreme Court of California, but other appellate courts of the state have had occasion to consider the question. In *People v. Fowler,* 32 Cal. App. Supp. 737, 84 P. 2d 326, the court first considered the meaning of the authorization 'to practice chiropractic . . . as taught in chiropractic schools or colleges.' The court held that this section authorized licensees to practice chiropractic as taught in chiropractic schools or colleges at the time of the enactment of the Chiropractic Law. The court observed that the term 'chiropractic' had a well-established and quite definite meaning when the statute was enacted, that is, that chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the curing of disease."

The question was presented in this case as to whether or not a chiropractor which used such devices could be classed as a physician within the meaning of the regulations which provide that the Halox device did not require labeling for use. The court in that case held that a chiropractor was not included in the term physician as set forth in the regulations and therefore the device was not exempt from labeling. The distinction between the *"Halox* Case" and the case before the court is obvious. The claimant's position in the *"Halox* Case" was that the devices were mechanical and came within the exemption of

the Food and Drug Act because Section 7 of the Chiropractic Act authorized chiropractors "to use mechanical . . . measures incident to the care of the body." The court held that the Halox Generator was not within the term "mechanical" as it is used in Section 7 of the Chiropractic Act. This case involved the inhalation of chlorine gas which is obviously at great variance with any definition of physiotherapy. The machine's only function was generating chlorine gas and as such it had no therapeutic use or function. The generators bore no directions for use and the claimant rested his case on the proposition that the devices were exempt from this requirement by virtue of the exemption regulations.

It appears quite clear that in the *"Halox* Case", although it was asserted the device was mechanical, its action was purely chemical.

In the case of *People v. Mangiagli,* 97 Cal. App. 2d Supp. 935, 218 P. 2d 1025, the defendant was a chiropractor prosecuted for violations of the provisions of the Business and Professions Code regarding medical practice (Div. 2, Chap. 5). Objection was made to the complaint on the grounds that it was too vague and uncertain. The complaint was in the words of the statute describing the offense (Bus. and Prof. Code, Sec. 2141) and the court held that the complaint must be regarded as sufficient. The court stated on page 938 that "the legal problems presented here are substantially identical with those considered in *People v. Fowler* (1938),

32 Cal. App. 2d Supp. 737". The court stated at the bottom of page 938:

> "Considerable time was consumed at the trial by the introduction of evidence by defendant to show that what he did is now taught in chiropractic schools and colleges. This matter was discussed in the Fowler case, *supra,* where we held that section 7 authorized, by the provision, numbered as (1) above, nothing that was not chiropractic, as that term was understood in 1922, when the act was passed, and that the term was then defined as 'A system of (or) the practice of adjusting the joints, especially of the spine, by hand for the curing of disease' (32 Cal. App. 2d Supp. 745-6). We further said, regarding chiropractic schools: 'The effect of the words "as taught in chiropractic schools or colleges" is not to set at large the signification of "chiropractic," leaving the schools and colleges to fix upon it any meaning they choose. Were the word "chiropractic" of unknown, ambiguous or doubtful meaning, this clause, "as taught" etc., might serve to provide a means of defining or fixing its signification, but there is here no such lack of clarity. The scope of chiropractic being well known, the schools and colleges, so far as the authorization of the chiropractor's license is concerned, must stay within its boundaries; they cannot exceed or enlarge them. The matter left to them in merely the ascertainment and selection of such among the possible modes of doing what is comprehended within that term as may seem to them best and most desirable, and so the fixing of the standards of action in that respect to be followed by chiropractic licensees.' "

X.

Chiropractic Is Not a Stationary Science the Scope of Which Cannot Be Expanded by Scientific Developments as Contended by the Appellee.

It is submitted that the Chiropractic Act of 1922, did not place upon the chiropractors a static profession. The practice of chiropractic is ever progressing and the Act contemplated the use by chiropractors of advancements, knowledge and new developments in the fields taught by chiropractic schools and colleges without limitation. The State Board of Chiropractic Examiners has authority, which it has exercised, to increase standards and educational requirements to cover new developments in the various subjects of chiropractic, including physiotherapy. It is submitted that there is no rule of law or limitation requiring that physiotherapy or any other subject be taught the same way today as it was taught in 1922, or that chiropractors may not take advantage of new developments and advancements made in their field. It is asserted that since ultrasonics was not specifically taught in schools and colleges as of 1922 that such teachings are barred forever and further that ultrasonics cannot therefore be included within the scope of the chiropractic license. Ultrasonics, at least in this country, was comparatively unknown in 1922 and therefore could not have been taught in schools and colleges. Indeed there are many devices being used by chiropractors today which were unknown at that time but their useage is the results of developments within the field of the subjects taught in schools

and colleges at the time of the adoption of the Chiropractic Act in 1922.

In 1947 (Stat., 1947, Chap. 151) the additional requirements for licensure were increased to 4,000 hours from 2,400 hours and the curriculum presently parallels that of the grade A medical college. These requirements are as follows:

> Chiropractic Act. License to Practice; Fee; Educational Requirements.
>
> "Sec. 5. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars ($25) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic school or college which teaches a course of not less than 4,000 hours, extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or proof, satisfactory to the board, of education equivalent in training power to a high school course.
>
> "The schedule of minimum educational requirements to enable any person to practice chiropractic in this State is as follows, except as herein otherwise provided:

Group 1	
Anatomy, including embryology and histology	18 to 20%
Group 2	
Physiology	6 to 8%
Group 3	
Biochemistry, inorganic and organic chemistry	6 to 8%
Group 4	
Pathology and bacteriology	10 to 12%
Group 5	
Public health, hygiene and sanitation	3 to 4%
Group 6	
Diagnosis, pediatrics, dermatology, syphilology and psychiatry	12 to 18%
Group 7	
Obstetrics and gynecology	3 to 4%
Group 8	
Principles and practice of chiropractic, physiotherapy and office procedure	25 to 28%
Total	83 to 100%
Electives	17 to 0%"

The increased educational requirements of 1944 were subsequently challenged in the courts. When presented to the District Court of Appeal (hearing in the Supreme Court being subsequently denied) the court took cognizance of changes and changed conditions affecting the use and application of therapeutic methods. In the case of

Hunt v. Board of Chiropractic Examiners, 87 Cal. App. 2d 98, 196 P. 2d 77, the court states:

> "The statute prescribes a schedule of 'minimum' educational requirements prerequisite to examination for license to practice covering 2400 academic hours. This was enacted in 1922. The appellate board, in 1944, by rule increased the required number of academic hours to 4000. It is hardly necessary to allude to the great number of changes and improvements that have been made in the healing arts during this period of twenty-two years. It can not be argued that the appellate board acted arbitrarily or unreasonably in demanding this additional education. *To the contrary, it would be more reasonable to say that it would have been deficient in its duties as an agency concerned with the public health if it had neglected to so act.*
>
> "(4, 5) it is a fair and reasonable interpretation of the statute that it was intended to permit the board to take cognizance of these conditions so as to provide more efficient treatment of the sick, and that it was with such purpose in view that the statute fixed the 'minimum' requirements and gave to the board the power to enact rules 'proper and necessary for the performance of its work.' If this is not a proper interpretation of the statute, then we can see no reason for the use of the word 'minimum' in section 5. Respondents' argument that the statute was enacted to relieve the chiropractors from the unreasonable control of the medical board does not explain the use of the word 'minimum.' If the purpose was to fix a schedule of educational requirements which no board or agency could exceed then the proper word would have been 'maximum'. But in fixing a 'minimum' schedule the meaning expressed in the clear language of the statute is that 'at least' such hours of instruc-

tion were required and thus it was left open to the board to require additional instruction either in the same subjects of study specified in the statute or in new or additional subjects as the board might determine. For these reasons the judgments in the four causes which were based on the additional educational requirements cannot be sustained." (Emphasis supplied.)

The Attorney General of the State of California, in Attorney General's Opinion 48/292, stated as follows:

"The State has the right to specify and lay out a course of study and establish a standard of efficiency. (People v. Radledge, 172 Cal. 401, at 406.) The same reasons which control imposing conditions upon the compliance with which one engaged in the healing arts is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more accurate knowledge is acquired of the human system of the agencies by which it is effected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice. (Dent v. West Virginia.) Regulatory laws may be made operative on those engaged in the practice prior to the enactment of the laws and the state may change the qualifications from time to time, making them more rigid. Legislation prescribing qualifications which a practitioner cannot meet because of conditions antedating the enactment of the legislation is valid. (Butcher v. Maybury, 8 Fed. 2d 155, 159.) When once issued, there is a right in a license which will be protected by the courts from improper or arbitrary action by the licensing board. (Randall v. Board of Medical Examiners, 110 Cal. App. 61.)"

XI.

Section 7 of the Chiropractic Act Authorizing Chiropractors "to Use All Necessary Mechanical, and Hygienic and Sanitary Measures Incident to the Care of the Body" Is an Addition to the Scope of Chiropractic.

The second part of Section 7 of the Chiropractic Act contains the authorization "to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body." In *People v. Fowler, supra,* the court held that this phrase "is not a definition of, but an addition to, chiropractic as used in the previous part of section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses." (See also *U. S. v. Halox Therapeutic Generator etc., supra.*) There appears to be no disagreement by the California courts that this part of Section 7 is an addition to the scope of chiropractic as defined therein. There seems to be little doubt that this was so intended under the Act since certain other acts, such as the Naturopathic Statute and the Drugless Practitioners Act were repealed by the adoption of the Chiropractic Act.

There is no question but what the drugless practitioners of 1922 could and did practice physiotherapy. Section 2231 of the California Business and Professions Code (now repealed) provided a course of study necessary to obtain a drugless practitioner's certificate which included 500 hours of manipulative and mechanical therapy.

It is submitted that this portion of Section 7 of the Chiropractic Act is inconsistent with the holding of the District Court that "chiropractic is a system for the practice of adjusting the joints, especially at the spine, by hand, for the treatment of disease and ailments."

XII.

To Determine the Scope of Chiropractic in the State of California the Entire Chiropractic Act of 1922 Should Be Determined.

The decisions of this State which have discussed the scope of chiropractic have invariably been limited to an examination and consideration of Section 7 of the Chiropractic Act. It is submitted that Section 7 should be considered along with other provisions of the Chiropractic Act an examination of which is valuable in determining what was intended with respect to the scope of chiropractic.

Section 5 of the act sets forth a schedule of minimum educational requirements to enable any person to practice chiropractic in this state. It should be noted that Group 8 of Section 5 provides as one of the educational requirements as follows: "Principles and practices of chiropractic, physiotherapy, and office procedure."

Section 6(c) of the Act provides for written examinations for each of the subjects set forth in Section 5 to ascertain the fitness of an applicant to *practice chiropractic* (emphasis added).

Section 13 of the Act requires chiropractic licentiates to observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made.

Section 16 of the Act provides that there shall be nothing in the Act to prohibit service in the case of emergency and

"nor shall this Act be construed so as to discriminate against any particular school of chiropractic . . ."

Section 18 provides for the repeal of any other act which is in conflict with the Chiropractic Act.

It is submitted that when Section 7 is examined in the light of the whole Chiropractic Act the authority of the chiropractor by virtue of his license is considerably more broad than the definition adopted by the District Court to the effect that "chiropractic is a system for the practice of adjusting the joints, especially at the spine, by the hand for the treatment of disease and ailments." The chiropractor's duty under the Act to observe all state and municipal regulations relating to all matters pertaining to the public health; to sign death certificates and make reports to the proper authorities, and to provide service in cases of emergency, provides a basis for concluding that chiropractic embraces a philosophy of healing which the people intended to establish as a coordinate along with medicine, surgery and osteopathy.

Section 6(c) of the Act has not been amended since the adoption of the Chiropractic Act in 1922. It provides in effect, as stated before, for written examinations in all of the subjects set forth in Section 5 to ascertain *fitness of an applicant to practice chiropractic* (emphasis added). This of itself shows that the intent of the Act was to include within the scope of the chiropractic practice all of the matters set forth in Section 5 relating to the minimum educational requirements.

The course of study as provided by statute is quite similar for medicine, osteopathy and chiropractic. It would seem a fair inference that the people intended by their initiative act to parallel the chiropractic profession with

these other professions up to the point that chiropractors are not authorized to practice medicine, surgery, or osteopathy nor use any drug or medicine included *in materia medica*. The Chiropractic Act itself contains proper safeguards against any attempt to enlarge the practice of chiropractic to interfere with these other fields.

Conclusion.

It is respectfully submitted that the Motion to Compel Administrative Approval of Claimant's Proposed Method of Distributing Devices under Seizure be granted. The scope of the practice of chiropractic is not limited to the adjustment of the spine by hand but includes the use of drugless adjunct therapy and that physiotherapy is such an adjunct therapy.

It is further submitted that the devices in question are intended for use in the field of physiotherapy and that such devices come within the exception to the labeling provisions of the Federal Food, Drug, and Cosmetic Act as contained in 21 C. F. R. 1.106(3).

Respectfully submitted,

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APPENDIX.

Chiropractic Initiative Act of 1922.

"Section 1. A board is hereby created to be known as the 'state board of chiropractic examiners,' hereinafter referred to as the board, which shall consist of five members, citizens of the State of California, appointed by the governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a graduate thereof and hold a diploma therefrom.

"Each member of the board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. No two persons shall serve simultaneously as members of said board, whose first diplomas were issued by the same school or college of chiropractic, nor shall more than two members be residents of any one county of the state. And no person connected with any chiropractic school or college shall be eligible to appointment as a member of the board. Each member of the board, except the secretary, shall receive a per diem of ten dollars for each day during which he is actually engaged in the discharge of his duties, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, such per diem traveling expenses and other incidental expenses of the board or of its members to be paid out of the funds of the board hereinafter defined and not from the state's taxes."

"Sec. 2. Within sixty days of the date upon which this act takes effect, the governor shall appoint the mem-

bers of the board. Of the members first appointed, one shall be appointed for a term of one year, two for two years, and two for three years. Thereafter, each appointment shall be for the term of three years, except that an appointment to fill a vacancy shall be for the unexpired term only. Each member shall serve until his successor has been appointed and qualified. The governor may remove a member from the board after receiving sufficient proof of the inability or misconduct of said member."

"Sec. 3. The board shall convene within thirty days after the appointment of its members, and shall organize by the election of a president, vice-president and secretary, all to be chosen from the members of the board. Thereafter elections of officers shall occur annually at the January meeting of the board. A majority of the board shall constitute a quorum.

"It shall require the affirmative vote of three members of said board to carry any motion or resolution, to adopt any rule, or to authorize the issuance of any license provided for in this act. The secretary shall receive a salary to be fixed by the board in an amount not exceeding one thousand dollars per annum, but not per diem, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, and shall give bond to the state in such sum with such sureties as the board may deem proper. He shall keep a record of the proceedings of the board, which shall at all times during business hours be open to the public for inspection. He shall keep a true and accurate account of all funds received and of all expenditures incurred or authorized by the board, and on the first day of December of each year he

shall file with the governor a report of all receipts and disbursements and of the proceedings of the board for the preceding fiscal year."

"Sec. 4. The board shall have power:

(a) To adopt a seal, which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the secretary of state for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed."

"Sec. 5. It shall be unlawful for any person to practice chiropractic in this state without a license so to do. Any person wishing to practice chiropractic in this state shall make application to the board fifteen days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an incorporated chiropractic school or college which teaches a course of not less than two thousand four hundred hours, extended over a period of three school terms

of at least six months each, and must give satisfactory proof of having attended not less than ninety per cent of said two thousand four hundred hours, and shall present to the board at the time of making such application, a diploma from a high school, or proof, satisfactory to the board of education equivalent in training power to a high school course.

The schedule of minimum educational requirements to enable any person to practice chiropractic in this state is as follows, to wit, except as herein otherwise provided:

Anatomy	600 hours
Histology	100 hours
Elementary chemistry and toxicology	100 hours
Physiology	200 hours
Bacteriology	100 hours
Hygiene and sanitation	100 hours
Pathology	400 hours
Diagnosis or analysis	400 hours
Chiropractic theory and practice	500 hours
Obstetrics and gynecology	100 hours
Total	2400 hours"

"Sec. 6. (a) The board shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties. The office of the board shall be in the city of Sacramento. Sub-offices may be established in Los Angeles and San Francisco, and such records as may be necessary may be transferred temporarily to such sub-offices. Legal proceedings against the board may be instituted in any one of said three cities.

"(b) Each applicant shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded.

"(c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools or colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in section five hereof. A license shall be granted to any applicant who shall make a general average of seventy-five per cent, and not fall below sixty per cent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further cost, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation the applicant shall be given a credit of one per cent on the general average."

"Sec. 7. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated 'License to practice chiropractic,' which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included *in materia medica.*"

"Sec. 8. Any person who shall have practiced chiropractic for two years after graduation from a chiropractic school or college, one year of which shall have been in this

state preceding the date upon which this act takes effect, or any person who graduated from a chiropractic school or college prior to January 1, 1922, and who shall present to the board satisfactory proof of good moral character and having pursued a resident course of not less than two thousand hours in a legally incorporated chiropractic school or college, shall be given a practical and clinical examination in chiropractic philosophy and practice, and if he, or she, make a grade of seventy-five per cent in such examination, the board shall grant a license to said applicant to practice chiropractic in this state under the provisions of this act; provided, however, that application for said license is made within six months of the date upon which this act takes effect and that each applicant shall pay to the secretary of the board the sum of twenty-five dollars."

"Sec. 9. Notwithstanding any provision contained in any other section of this act the board, upon receipt of the fee of twenty-five dollars, shall issue a license to any of the following named persons:

(a) To each member of the board.

(b) To any person licensed to practice chiropractic under the laws of another state, having the same general requirements as prescribed in this act; and provided, further, that such other state in like manner grants reciprocal registration to chiropractic practitioners of this state."

"Sec. 10. (a) The board shall refuse to grant, or may revoke, a license to practice chiropractic in this state, or may cause a licensee's name to be removed from all records of licensed practitioners of chiropractic in this state, upon any of the following grounds, to wit:

"The employment of fraud or deception in applying for a license or in passing an examination as provided in this act; the practice of chiropractic under a false or assumed name; or the personation of another practitioner of like or different name; the conviction of a crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics or stimulants to such an extent as to incapacitate him for the performance of his professional duties; the advertising of any means whereby the monthly periods of women can be regulated or the menses reestablished if suppressed; or the advertising, directly, indirectly or in substance, upon any card, sign, newspaper advertisement, or other written or printed sign or advertisement, that the holder of such license or any other person, company or association by which he or she is employed, or in whose service he or she is employed, or in whose service he or she is, will treat, cure, or attempt to treat or cure, any veneral disease, or will treat or cure, or attempt to treat or cure, any person afflicted with any sexual disease, for lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs, or being employed by, or being in the service of any person, company or association so advertising. Any person who is licentiate, or who is an applicant for a license to practice chiropractic, against whom any of the foregoing grounds for revoking or refusing a license is presented to the board with a view of having the board revoke or refuse to grant a license, shall be furnished with a copy of the complaint, and shall have a hearing before the board in person or by an attorney, and witnesses may be examined by the board respecting the guilt or innocence of the accused. The secretary on all cases of revocation shall enter on his register the fact of such revocation, and shall certify the

fact of such revocation under the seal of the board to the county clerk of the counties in which the certificates of the person whose certificate has been revoked is recorded; and said clerk must thereupon write upon the margin or across the face of his register of the certificate of such person the following: 'This certificate was revoked on the ..... day of .....,' giving the day, month and year of such revocation in accordance with said certification to him by said secretary. The record of such revocation so made by said county clerk shall be *prima facie* made evidence of the fact thereof, and of the regularity of all proceedings of said board in the matter of said revocation.

"(b) At any time after two years following the revocation or cancellation of a license or registration under this section, the board may, by a majority vote, reissue said license to the person affected, restoring him to, or conferring on him all the rights and privileges granted by his original license or certificate. Any person to whom such rights have been restored shall pay to the secretary the sum of twenty-five dollars upon the issuance of a new license.

"Sec. 11. (a) Every person who shall receive a license from the board shall have it recorded in the office of the county clerk of the county in which he resides, and shall have it likewise recorded in the counties into which he shall subsequently move for the purpose of practicing chiropractic.

"(b) The failure or the refusal on the part of the holder of a license to have it recorded before he shall begin to practice chiropractic in this state, after having been notified by the board to do so, shall be sufficient

ground to revoke or cancel a license and to render it null and void.

"(c) The county clerk of each county in this state shall keep for public inspection, in a book provided for that purpose, a complete list and description of the licenses recorded by him. When any such license shall be presented to him for record he shall stamp upon the face thereof his signed memorandum of the date when such license was presented for record.

"Sec. 12. Each person practicing chiropractic within this state shall, on or before the first day of January of each year, after a license is issued to him as herein provided, pay to said board of chiropractic examiner a renewal fee of two dollars. The secretary shall, on or before November first of each year, mail to all licensed chiropractors in this state a notice that the renewal fee will be due on or before the first day of January next following. Nothing in this act shall be construed to require the receipts to be recorded in like manner as original licenses. The failure, neglect or refusal of any person holding a license or certificate to practice under this act in the State of California to pay said annual fee of two dollars during the time his or her license remains in force shall, after a period of sixty days from the first day of January of each year, *ipso facto,* work a forfeiture of his or her license or certificate, and it shall not be restored except upon the written application therefor and the payment to the said board of a fee of ten dollars, except that such licentiate who fails, refuses or neglects to pay such annual tax within a period of sixty days after the first day of January of each year shall not be required to submit to an examination for the reissuance of such certificate.

"Sec. 13. Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made.

"Sec. 14. All moneys received by the board under this act shall be paid to the secretary of said board, who shall give a receipt for the same and shall at the end of each month report to the state controller the total amount of money received by him on behalf of said board from all sources, and shall at the same time deposit with the state treasurer the entire amount of such receipts, and the state treasurer shall place the money so received in a special fund, to be known as the 'state board of chiropractic examiners' fund,' which fund is hereby created. Such fund shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this act, upon proper claims approved by said board or a finance committee thereof.

"Sec. 15. Any person who shall practice or attempt to practice cihropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title 'chiropractor' or 'D. C.' or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor,' or 'D. C.' immediately following his name, or the use of the letters 'M. D.' or the words 'doctor of

medicine,' or the term 'surgeon,' or the term 'physician,' or the word 'osteopath,' or the letters 'D. O.' or any other letters, prefixed or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hudnred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days or both.

"Sec. 16. Nothing in this act shall be construed to prohibit service in case of emergency, or the domestic administration of chiropractic, nor shall this act apply to any chiropractor from any other state or territory who is actually consulting with a licensed chiropractor in this state; provided, that such consulting chiropractor shall not open an office or appoint a place to receive patients within the limits of the state; nor shall this act be construed so as to discriminate against any particular school of chiropractic, or any other treatment; nor to regulate, prohibit or apply to any kind of treatment by practice of religion. Nor shall this act apply to persons who are licensed under other acts.

"Sec. 17. It shall be the duty of the several district attorneys of this state to prosecute all persons charged with the violation of any of the provisions of this act. It shall be the duty of the secretary of the board, under the direction of the board, to aid attorneys in the enforcement of this act.

Sec. 18. Nothing herein shall be construed as repealing the 'medical practice act' of June 2, 1913, or any sub-

sequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.

"Sec. 19. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act. The electors hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."